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Supreme Court of the United States

APRIL TERM, 1953.

No. .....

NEW PITTSBURGH COAL COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on the fifth day of January, 1953, in the above entitled cause (R., page 51).

JUDGMENT BELOW.

The decision of the court below is reported in 200 F. (2d), page 146.

JURISDICTION.

This court has jurisdiction to review said decision under Section 240 of the Judicial Code (28 U. S. C. A. No. 347).

This case presents an important question of general law in that it would establish a rule for the Sixth Circuit different from the rule of other circuits, notably the fourth and fifth.

Obviously it would be impracticable if not impossible for taxpayers and accountants in the Sixth Circuit, and for the Bureau of Internal Revenue to apply such a rule in actual practice.

QUESTIONS PRESENTED.

Should the cost of mine rail, purchased by a coal mining company operating only fully developed mines and therefore to be charged to current operations, be so charged at the time of purchase consistent with the taxpayer's practice followed and approved in former years (as is the established rule in the Fourth and Fifth Circuits), or must the taxpayer wait until all of such rail has been used and its "exact use" so determined, as the Court of Appeals' decision would establish the rule for the Sixth Circuit?

STATEMENT.

The Collector of Internal Revenue held that the taxpayer had erroneously charged to expense 22 items that should have been capitalized. (Finding No. 4, R., 12.)

Upon the taxpayer's claim for refund the commissioner reversed himself as to 7 items of copper wire. (Findings Nos. 5 and 7, R., 13.)

In the instant litigation on the remaining 15 items the government took the position in the District Court that (in spite of the allowance as expense of the cost of copper wire, which it would have required to be capitalized if the mines had not been fully developed) the taxpayer must prove that the mines had been developed and equipped to their predesigned and normal output capacity. The District Court found that all the mines had been so developed; and the government has not appealed. (Finding No. 8, R., 13.)

The District Court held that the commissioner had erroneously charged to capital 7 items in addition to the copper wire; and the government has not appealed. (Conclusion of Law No. 5, R., 16.)

But the District Court held (Conclusion of Law No. 6, R., 16) that the appellant had failed to prove that the commissioner had improperly charged to capital the remaining 8 items:

1. 40 pound rail in mines 14, 15 and 16 (3 items). (Findings Nos. 12 and 15.)

2. 80 pound rail for temporary storage of railroad cars at mine No. 16. (Finding No. 13.)

3. Adding machines (2 items), furnace for superintendent's house, and freight elevator in mine store. (Findings Nos. 16, 17, and 18

The plaintiff appealed and the Court of Appeals reversed the District Court as to Item No. 2 and affirmed as to Items 1 and 3. The decision as to Item 3, unsubstantial in amount, presents no question for this court; but the decision as to Item No. 1 presents a question of general interest to all coal mining companies, and the Court of Appeals has denied rehearing.

RULINGS OF THE COURT BELOW.

In the thirty years that this matter has been before the bureau and the courts the original holding of the collector that the taxpayer had erroneously charged to expense 22 items that should have been capitalized has been **reversed** as to all substantial items except 40 pound mine rail.

As to the 40 pound mine rail the **only** finding of fact was, "There is no evidence as to the exact use made of any of the 40 pound rail in question in this lawsuit," and the District Court held that in the absence of evidence as to "the exact use made of any of the 40 pound rail in question" the cost thereof should be charged to capital, and the Court of Appeals affirmed.

REASONS FOR GRANTING THE PETITION.

After a long period of controversy, the Circuit Courts of Appeals for the Fourth and Fifth Circuits, embracing a large part of the coal producing territory of the United States, agreed on the correct rule to be applied. Since a very large percentage of the cases involving the question arose from that territory, the Board of Tax Appeals was practically forced, in the **West Virginia & Pittsburgh Coal Company** case (24 B. T. A., 234), September 30, 1931, to reverse the **Union Collieries** decision and thereafter to apply the **Marsh Fork** rule. We quote from page 241:

"The principal issue in these proceedings is whether the petitioner may deduct from gross income in the tax years involved amounts paid for additional machinery and equipment to maintain the normal output of its mines. The issue is decided in favor of the petitioner, upon the authority of **United States v. Roden Coal Co.**, 39 F. (2d), 425; **Marsh Fork Coal Co. v. Lucas**, 42 F. (2d), 83; **Commissioner of Internal Revenue v. Brier Hill Collieries**, 50 F. (2d), 477, inconsistent with or reversing decisions of the board which held that such expenditures were not deductible from gross income as ordinary and necessary expense. In view of the above cited cases, the decision of the board in **Union Collieries Co.**, 3 B. T. A., 540, will not be followed in the future."

Thereafter, that is since 1931, the government abandoned its attempts, in all **new** cases, to procure acceptance of its erroneous view of the law; but the instant case was already pending and the government has not ceased **in this case** to contend for the erroneous rule.

The well established **Marsh Fork** rule (Fourth and Fifth Circuits) should not be disturbed by a decision in this case in which the government, years ago, took a position that it has long since abandoned.

It is obvious that the cost of all expense items, such as mine rail, must be properly entered on the books of the company **at the time of purchase** or delivery at the mine and not at some future date, which would probably be during a future taxable year, when the rules have all been used and the **"exact"** use therefore established.

A correct rule should be stated by the Supreme Court to guide all mining companies in future years.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT OF APPEALS.

The opinion rendered by the Court of Appeals is reported in 200 Fed. (2d), 146.

JURISDICTION.

The judgment of the Circuit Court, denying petition for rehearing, was entered January 5, 1953. Time within which to file this petition was extended to and including April 25, 1953.

THE FACTS.

The entire finding of the government's valuation engineer as to mine rail was as follows:

> "This mine rail is used generally on the main entries. It is not shown that the rail purchased was used for the purpose of repairing the existing haulage track. It is probable that the permanent track was extended. The main haulage roads serve the entire tonnage and any additions thereto constitute improvements. Where a company has adopted a policy of charging similar costs to expense each year after the stage of operations has been reached it should be continued. In this case it has not been shown that the past practice has been to charge such costs to operations. It appears, therefore, that this cost properly belongs in the capital account."

In the trial court the adopted policy of charging similar cost to expense each year was shown. (R., 20, 36-38.)

The mines had been developed and equipped to produce, and were capable of producing their predesigned and expected maximum tonnage. (Finding No. 8, R., 14.)

The use of 110 additional mine cars was made necessary by the receding working faces and the consequently longer hauls from the working faces to the tipples. (Finding No. 15, R., 15.)

All the mines had forty pound rails in the main entries. (Sup. R., 7) No evidence was offered to show whether any of the rail was used for repairing rather than extending the haulage track, as this is immaterial. The sole finding of the trial court was: "There is no evidence as to the exact use use made of any of the 40 pound rails in question in this lawsuit." (Finding 12, R., 14.)

The history of the instant case appears in the statement in the petition.

SPECIFICATION OF ERROR.

The court held that the cost of mine rail, charged to expense by the taxpayer in accordance with its practice of prior years, should not have been so charged because the "exact use" was not shown. This is in direct conflict with the well established **Marsh Fork** rule (**Marsh Fork Coal Co. v. Lucas**, 42 F. (2d), 83, C. A., 4th). The principles of the **Marsh Fork** rule applicable to the instant case were recently quoted and approved in **Commissioner v. Harmon Coal Corp.**, — Fed. (2d), —, C. A. 4th, Sept. 17, 1952.

ARGUMENT.

The trial court found that at the time of the purchase the mines had been fully developed to their predesigned and expected maximum tonnage (Finding 8, R., 14) and that the use of additional mine cars was made necessary by the receding faces and the consequently longer hauls from the working faces to the tipples. The 40-pound rail was as such a part of the "permanent haulage road" as the cars and the copper wire (R., 26 and Sup. R., 7). The undisputed testimony that 16-pound rail was used in the rooms (Sup. R., 7) negatives the use of the 40-pound rail for any purpose other than to extend or repair the main haulage tracks, but even if it were so used the cost would be deductible if the **Marsh Fork** rule is correct.

The court's decision is in conflict with, and would establish a rule for the Sixth Circuit different from, the rule of other circuits, notably the fourth and fifth.

Marsh Fork Coal Co. v. Lucas, 42 F. (2d), 83, C. A. 4th;
Parkersburg Iron & Steel Co. v. Burnet, 48 F. (2d), 163, C. A. 4th;
Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp., 64 F. (2d), 347, C. A. 4th;
United States v. Roden Coal Co., 39 F. (2d), 425, C. A. 5th;
Commissioner v. Harmon Coal Corp., —— F. 2d), ——, C. A. 4th.

THE MARSH FORK RULE.

The **Marsh Fork** decision is not based upon facts peculiar to that particular case. It discusses in detail **general** accounting methods and announces the rule to be followed in all mines after reaching the stage of producing the predetermined output capacity. Quoting Dicksee, Mines Accounting and Management, the court said (p. 86):

"After the producing stage is reached, no expenditure should be charged to Capital Account except **large special items**, (emphasis added) such as (1) Purchase of additional property; (2) Sinking of new main shafts to reach ore bodies; (3) Erection of additional buildings, machinery, plant, or surface works which may be necessary either to increase output, to improve recovery, or to decrease costs."

And quoting Regulations 45, Art. 222, the court said (p. 87):

"After a mine has been developed and equipped to its normal and regular output capacity, the cost of minor items of equipment and plant, including mules, motors, mine cars, trackage, cables, trolley wire, fans, small tools, etc., necessary to maintain the normal output, and the cost of replacement may be charged to current expenses of operation."

The opinion in the **Marsh Fork** case reveals an exhaustive study of the outstanding authorities on mine accounting and a careful detailed exposition of the rules to be applied. It is respectfully submitted that the Supreme Court of the United States should not place its approval upon the hastily considered **per curiam** opinion of the Sixth Circuit upsetting the well considered, long established rule of the Fourth and Fifth Circuits.

Respectfully submitted,

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